STATE OF MICHIGAN

JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

HON. BEVERLY NETTLES-NICKERSON

Veterans Memorial Courthouse
313 W. Kalamazoo St.
PO Box 40771
Lansing, MI 48901
_____/

Formal Complaint No. 81
Hon. Leopold P. Borrello
February 12, 2008

THE MASTER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History

On, June 13, 2007 the Supreme Court appointed retired Circuit Judge Leopold P. Borrello as Special Master to preside over the hearing of Formal Complaint No. 81, filed by the Judicial Tenure Commission against Honorable Beverly Nettles-Nickerson, 30th Circuit Court, Lansing, Michigan. The Judicial Tenure Commission issued the complaint on May 16, 2007. Respondent filed her answer on May 31, 2007. The Supreme Court relieved Judge Nettles-Nickerson of her judicial and administrative duties and then suspended her with pay on June 6, 2007 pursuant to a petition for interim suspension filed by the commission.

Beginning on September 18, 2007, the Master listened to proofs for eight weeks. He admitted 141 exhibits. The parties filed their briefs and proposed findings of fact and conclusions of law on January 4, 2008 and filed their replies on January 18, 2008. The

Master concluded that the briefs and replies more than adequately covered the issues and declined to hear oral closing arguments.

Standard of Proof

The standard of proof in disciplinary cases is by a preponderance of the evidence. *In re Ferrara*, 458 Mich 350, 360; 582 NW2d 817 (1998). The purpose of judicial discipline is not to punish, but to maintain the integrity of the judicial process. *In re Seitz*, 441 Mich 590, 624; 495 NW2d 559 (1993). The proceedings are civil and not quasi-criminal in nature precisely because their purpose is the maintenance of standards of judicial fitness. *In re Probert*, 411 Mich 210, 225; 308 NW2d 773 (1981).

Count I: Fraudulent claim of residency to obtain a divorce

The Master finds by a preponderance of the evidence that respondent did make a fraudulent claim of residency to obtain a divorce based upon the following:

Daniel Nickerson testified that in May 2005 he and respondent were having marital problems and he moved out of the marital residence in Okemos and stayed with his mother in Grand Rapids for two weeks. Mr. Nickerson then moved back in to the Okemos home where he continued to reside until its sale in 2007. Respondent moved to a separate residence. (Tr X, 1688-1690).

Deborah Green, the Region I Administrator for the State Court Administrator's Office testified that in June 2005 she received a phone call from respondent asking if Region I had a procedure for allowing a judge to get divorced in private. Ms. Green told respondent that there was no such procedure. (Tr II, 203-204). Respondent later

approached Ms. Green at a judicial conference and asked the same question and Ms. Green again told her there was no such procedure. (Tr II, 203-204).

James Hughes, the Region II Administrator for the State Court Administrator's Office (the region encompassing Ingham County) testified that on July 10, 2005 respondent called him. Respondent told him she was seeking a divorce and living at a house in Shiawassee County and she wanted to change her address and have her paycheck sent elsewhere. Mr. Hughes told her that Michigan court rules required her to live in the county where she was filing for divorce for 10 days immediately preceding the filing of the complaint. He also told her that in order to retain her office, the Michigan Constitution required that she live in Ingham County. (Tr I, 94-98). In response, Mr. Hughes sent respondent a memo dated July 15, 2005 reiterating what he told her in their telephone conversation. The memo informed her that MCL 552.9 requires that a person may only file a complaint in a divorce proceeding if the complainant or defendant has resided in the county in which the complaint is filed for 10 days immediately preceding the filing of the complaint. (Exhibit 4, citing MCL 552.9). The memo further noted that Michigan's Constitution requires that a judge reside in the county in which they serve, or vacate the judicial office. (Exhibit 4).

On August 15, 2005 respondent signed a complaint for divorce wherein she listed her husband Daniel Nickerson's address as 4320 Kalamazoo Ave SE, Grand Rapids. (Exhibit 10). The complaint states, "(d)efendant has resided within the County of Kent for at least ten days immediately prior to the filing of this Complaint." (Exhibit 10). In signing this document she attested to the truth of the statements contained within.

Furthermore, on June 16, 2006 respondent testified under oath that all of the allegations contained in the divorce complaint were true at the time they were made. (Exhibit 10).

Respondent's assertion under oath that her husband had resided in Kent County for at least ten days prior to the filing of the complaint was false. Her contention that she believed in good faith that Mr. Nickerson was living in Grand Rapids is completely belied by the evidence. Telephone records from the Okemos home of the Nettles-Nickerson family and from respondent's cell phone indicate that 48 calls were made to this home by respondent's cell phone during the time Mr. Nickerson was purportedly residing in Grand Rapids. (Exhibit 12). Specifically, on August 14, 2005, the evening before respondent signed the complaint for divorce, respondent's cell phone called the Okemos home twice for two minutes, then immediately called Mr. Nickerson's cell phone. (Tr VI, 883).

Judge Laura Baird testified that at a judges meeting in front of a number of judges, respondent spoke publicly about the Judicial Tenure Commission grievance. Judge Baird recalled that respondent said, "(w)hat does it matter that I filed a divorce in the wrong County, I have been on the bench for, I don't know how many years, 14 in District Court, or 12, whatever, and five years here, what difference does this make?" (Tr X, 1633). Respondent also told Judge Joyce Draganchuk that she had filed for divorce in the wrong county and said words to the effect of "so what, or big deal" and "[i]t was uncontested, and no one complained." (Tr VII, 985).

Rhonda Mitchell, a longtime babysitter for the Nickerson children testified that the Okemos home was occupied by Mr. Nickerson and the children during the summer of 2005. (Tr IX, 1427-1428).

Respondent claimed that the Okemos home was being used by Mr. Nickerson exclusively as a place to visit his children because they were not allowed to be in Grand Rapids around their grandmother's boyfriend or Mr. Nickerson's new girlfriend. This explanation simply does not support her position that she believed Mr. Nickerson was residing in Grand Rapids. Mr. Nickerson stated that he and respondent had a visitation schedule where the children stayed with their mother one week and their father the next. (Tr X, 1691). To contend that Mr. Nickerson stayed in the Okemos home every other week with the children, but was not "residing" there is absurd. Residence is defined under Michigan law as a place of abode accompanied with the intention to remain. *Leader v Leader,* 73 Mich App 276, 280; 251 NW2d 288 (1977). It was Mr. Nickerson's testimony that he planned to and did reside in the Okemos home until it could be sold. (Tr X, 1698).

In addition, respondent's attempts to blame her now-deceased attorney for this incident are without merit. Both respondent and her ex-husband are judges and should know that jurisdiction and venue are not "non-issues." (Tr XXIII, 3822, 3826). Moreover, as a judge, respondent is well aware that parties are not permitted to lie under oath even in situations where the false statement may not be perceived by the parties as having significance.

It is the Master's finding that respondent committed perjury when she testified that the allegations in the divorce complaint were true at the time she signed it. Furthermore, it is the Master's finding that respondent committed perjury during this proceeding on November 8, 2007 when she continued to contend that Mr. Nickerson was residing in Grand Rapids during the ten days immediately preceding the filing of her

divorce complaint. (Tr XXIII, 3826). Perjury contrary to MCL 750.422 occurs when a person under oath knowingly makes a false statement concerning a material issue, and there was a legal duty to take the oath. *People v Kozyra*, 219 Mich App 422, 428-429; 556 NW2d 512 (1996). Respondent's testimony was knowingly false, concerned a material issue and she had a legal duty to take the oath both in the underlying divorce case and in this proceeding.

Based upon these factual findings, the Master concludes that respondent is responsible for the following as a matter of law:

Perjury contrary to MCL 750.422;

Misconduct in office as defined by the Michigan Constitution of 1963, as amended, Article VI, §30 and MCR 9.205;

Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article VI, §30 and MCR 9.205;

Failure to establish, maintain, enforce and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to the Michigan Code of Judicial Conduct (MCJC), Canon 1;

Conduct involving impropriety and the appearance of impropriety, which erodes public confidence in the judiciary, in violation of MCJC, Canon 2A;

Failure to respect and observe the law and so conduct herself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary contrary to MCJC, Canon 2B;

Conduct prejudicial to the proper administration of justice, in violation of MCR 9.104(A)(1);

Conduct that exposes the legal profession or courts to obloquy, contempt, censure or reproach, contrary to MCR 9.104(A)(2);

Conduct contrary to justice, ethics, honesty or good morals, in violation of MCR 9.104(A)(3);

Conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(A)(4).

Count II: Making false statements, soliciting false statements by others, and/or fabricating evidence

A. Fabricating evidence

The Master finds by a preponderance of the evidence that respondent did fabricate evidence based on the following:

In the case of *Accu-Bite v Schein*, Case No. 05-1271-CB, attorneys appeared on Friday October 28, 2005. Respondent was on a scheduled vacation and supposed to return the following Monday. Another judge handled some of the issues. However, respondent's staff advised the attorneys that they should come back on Monday, October 31, 2005 to resolve the rest of the issues when respondent returned from vacation. (Tr V, 750). Attorneys appeared first thing in the morning on Monday, October 31. Respondent was not there. The appearance of the attorneys was a surprise to Angela Morgan, respondent's judicial assistant because she had been on vacation the previous Friday as well. Ms. Morgan called respondent at home to tell her that attorneys were there to see her. Respondent berated Ms. Morgan and swore at her. (Tr V, 753, Tr XI, 1784-1785).

On November 6, 2006 the Judicial Tenure Commission asked respondent about this incident. Respondent's answer claimed she had been on a scheduled vacation on October 31, 2005. (Exhibit 95). In support of this contention, respondent submitted an email to the Judicial Tenure Commission that respondent's assistant Angela Morgan had purportedly sent throughout the court indicating that respondent would be on vacation October 31, 2005. (Exhibit 20). This document (Exhibit 20) is undeniably false.

Respondent's court reporter Genevieve Hamlin checked her records to see if there was a record of respondent having October 31, 2005 as a vacation day. Ms. Hamlin could not find it on her calendar. (Tr V, 749, 755). Furthermore, Ms. Morgan did not believe respondent was scheduled for a vacation on that day and denied ever having sent the email in question. (Tr XI, 1784). The court's email system network had no record of the email having ever been sent. (Tr IX, 1528-1529, 1535-1536). Testimony from Ingham County's Senior Network Administrator, a computer expert, indicates that this email was never sent. (Tr IX, 1539).

Even a cursory review of this document by the Master reveals this document is a fabrication. According to the heading on the email, it was supposedly sent at the exact same time as another email (Exhibit 19) wherein respondent informed the rest of the court that she would be on vacation October 24 through 28. Also, the additional text in Exhibit 20 that reads "Monday, October 31" is typed in a different font. (Tr IX, 1544).

Finally, the Master finds respondent's attempts to blame the falsification of this document on others during her testimony to be unconvincing. (Tr XXIII, 3843-3846). Even if someone else drafted this bogus email, it is so obviously fake there is no way

respondent could have submitted it to the Judicial Tenure Commission without recognizing it as such.

B. Falsehoods to justify her improper behavior

The Master finds by a preponderance of the evidence that respondent did propagate falsehoods to justify her improper behavior based on the following:

According to the testimony of Kay Kirkpatrick, the clerk assigned to respondent's courtroom from 2003 to May, 2005, respondent took over the scheduling of cases for the No Progress Docket. (Tr VII, 1170-1171). The No Progress Docket is governed by MCR 2.502 and in the 30th Circuit Court is usually operated by clerks, not judges. (Tr VII, 1162-1163). One of the cases listed on the No Progress Docket by respondent was *Jones v City of Lansing*, Case No. 04-1322-CZ. On September 8, 2005 respondent improperly dismissed *Jones* for "lack of progress." (Exhibit 18). At the time of the dismissal the deadline for discovery had not passed. (Tr VIII, 1282-1284). Attorney Donald Busta appeared before respondent on behalf of the plaintiff and argued against the dismissal. (Exhibit 18).

The parties later refiled (Case No. 05-1090-CZ). (Exhibit 39). On February 5, 2007 a pre-trial was held by telephone. The following day respondent sent a letter to plaintiff's attorney Greg Liepshutz. The letter was a summary of the previous day's conference call and wrongly stated that neither counsel had appeared on September 8, 2005 to oppose the dismissal. (Exhibit 57).

The Master finds that respondent improperly dismissed *Jones v City of Lansing* in contravention of MCR 2.502 and then attempted to cover her mistake by lying about counsel's appearance at the No Progress Hearing.

C. Court reporter and required breaks

The Master finds by a preponderance of the evidence that respondent did pressure her court reporter to lie and say she was getting her required breaks, and then retaliate when her court reporter refused based on the following:

In 2005 respondent changed her trial schedule so that they no longer took lunch breaks. This posed a problem for her court reporter Genevieve Hamlin. Hamlin talked to respondent about it, but nothing changed, so she talked to Chief Judge William Collette about her concerns. (Tr V, 767-770). Judge Collette sent respondent a memo informing her that the union contract required that court reporters get an hour lunch break between the hours of 11:30 a.m. and 1:30 p.m. (Tr V, 767-770).

In response, respondent directed Ms. Hamlin to send a memo to Judge Collette informing him that she was indeed getting her lunch breaks as required. (Tr V, 776-777). Ms. Hamlin did send Judge Collette an email; however, it was not to respondent's satisfaction. (Exhibit 21, Tr V, 780). Respondent had her judicial assistant send Ms. Hamlin an email requesting that Ms. Hamlin send Judge Collette a second memo including specific items that Ms. Hamlin felt were not accurate. (Tr V, 782-788; Exhibit 27).

On December 7, 2005 Ms. Hamlin sent a second memo to Judge Collette. (Exhibit 22). This email did not include the items requested by respondent, but did specify that Ms. Hamlin was not planning on resigning and insisted that union procedures be followed so she could take a lunch break between 11:30 and 1:30. (Exhibit 22). After Ms. Hamlin sent this memo, respondent became displeased and told her she thought it better that Ms. Hamlin work for another judge. (Tr V, 918-919). Thereafter, Ms. Hamlin

requested that she be transferred to another judge due to a "very hostile environment." (Exhibit 25).

Respondent attempts to cloud this issue by arguing that other judges in the 30th Circuit Court had a trial schedule that did not allow for lunch breaks. The issue here is not respondent's trial schedule, but her treatment of an employee who raised concerns about a violation of her union contract and respondent's attempts to make Ms. Hamlin lie to Judge Collette. Respondent deliberately disregarded a union contract after Ms. Hamlin requested that it be enforced. She then bullied Ms. Hamlin and pressured her to lie. When Ms. Hamlin declined, respondent retaliated by creating a hostile working atmosphere and suggesting she work for a different judge.

D. False accusations that Judge William Collette had tried to develop an improper social relationship

The Master finds by a preponderance of the evidence that respondent did make false accusations that Judge Collette tried to develop an improper social relationship with her based on the following:

Daniel Nickerson testified that on February 1, 2005 his then-wife, respondent, told him that Judge Collette was "coming on" to her and had invited her out for drinks. (Tr X, 1720-1721). Judge Collette testified that Mr. Nickerson came to his office and accused him of "coming on" to respondent. Judge Collette denied the allegation. (Tr XVII, 2901-2902). As a result of this accusation, Judge Collette and Mr. Nickerson, who were once friends, have never spoken again. (Tr XVII, 2901-2902). Respondent also told Judge Laura Baird that Judge Collette made inappropriate advances toward her and that

respondent had to tell Judge Collette that theirs was going to be a professional relationship. (Tr X, 1629-1630).

Although respondent denies ever making these statements, her testimony on the matter is not believable. During this proceeding she suggested that she was uncomfortable meeting with Judge Collette in a one-on-one situation in part because she is a woman and he is a man. (Tr XXIII, 3872). However, respondent also claimed that both Mr. Nickerson and Judge Baird were lying when they testified that she told them Judge Collette was attempting to cultivate an improper relationship with her. (Tr XIII, 3872-3873). Respondent's contradictions and vagaries in contrast with the uncomplicated and forthright testimony of the other witnesses lead the Master to conclude that respondent did indeed tell both Mr. Nickerson and Judge Baird that Judge Collette had made inappropriate advances toward her.

E. Transfer of court reporter

The Master finds by a preponderance of the evidence that respondent did make false accusations against Judge Collette, David Easterday and James Hughes during the press conference she called in her courtroom based upon the following:

On January 26, 2007 respondent called a press conference in her courtroom (Exhibits 5A and 5B). At this press conference, respondent publicly and falsely accused Judge Collette, Mr. Easterday and Mr. Hughes of advocating the termination of respondent's court reporter Dorothy Dungy and of "setting-up" respondent and "treating her differently from the other judges." (Exhibits 5A and 5B). Respondent also said that Judge Collette had retaliated against her and that she suspected him of setting her up to fail before her reelection. (Exhibit 5A). In addition, respondent publicly and falsely

accused Judge Collette and Mr. Hughes of repeatedly filing grievances against respondent with the Judicial Tenure Commission. (Exhibits 5A and 5B). This was proven to be untrue. (Tr I, 110; Tr XVII, 2941).

Based upon these factual findings, the Master concludes that respondent is responsible for the following as a matter of law:

Misconduct in office as defined by the Michigan Constitution of 1963, as amended, Article VI, §30 and MCR 9.205;

Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article VI, §30 and MCR 9.205;

Failure to establish, maintain, enforce and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to the Michigan Code of Judicial Conduct (MCJC), Canon 1;

Conduct involving impropriety and the appearance of impropriety, which erodes public confidence in the judiciary, in violation of MCJC, Cannon 2A;

Failure to respect and observe the law and to conduct herself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary, contrary to MCJC, Canon 2B;

Lack of personal responsibility for respondent's own behavior and for the proper conduct and administration of the court which she presides contrary to MCR 9.205(A);

Conduct prejudicial to the proper administration of justice, in violation of MCR 9.104(A)(1);

Conduct that exposes the legal profession or courts to obloquy, contempt, censure or reproach, contrary to MCR 9.104(A)(2);

Conduct contrary to justice, ethics, honesty or good morals, in violation of MCR 9.104(A)(3);

Conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(A)(4);

Failure to cooperate with a reasonable request for assistance by the Commission, contrary to MCR 9.208(B).

Count III: Coercing or pressuring court employees into listing cases on the No Progress Docket

The Master finds by a preponderance of the evidence that respondent did improperly list cases on the No Progress Docket based upon the following:

The No Progress docket is governed by MCR 2.502 and allows judges to dismiss cases that have not been progressing. Kay Kirkpatrick testified that she was the clerk assigned to respondent's courtroom from 2003, when respondent first took office, until 2005. (Tr VII, 1161). In the 30th Circuit Court, the clerks were typically in charge of the No Progress Docket. (Tr VII, 1162). Ms. Kirkpatrick ran the No Progress Docket when respondent first took office. Respondent soon became very involved determining which cases should be placed on the No Progress Docket. (Tr VII, 1165). Ms. Kirkpatrick was uncomfortable putting many of the cases selected by respondent on the No Progress Docket because they were not eligible to be placed there. (Tr VII, 1170). Ms. Kirkpatrick did not believe that respondent was following the court rules. In some instances cases that were already set for trial were put on the No Progress Docket. (Tr VII, 1176-1177; Exhibit 39). Other times, respondent would direct Ms. Kirkpatrick to

send out notices that cases had been put on the No Progress Docket before the 28 day notice period required by court rule had elapsed. (Tr VII, 1174). Respondent also ignored MCR 2.502 which requires 91 days of inactivity before cases could be put on the No Progress Docket. (Tr VII, 1168: Exhibit 37).

Ms. Kirkpatrick repeatedly brought these problems to the attention of respondent, but respondent still insisted that the ineligible cases be put on the No Progress Docket. (Tr VII, 1165). Ms. Kirkpatrick was so concerned that she went to her supervisor Kay Taylor. (Tr VII, 1165, 1275). Ms. Taylor discussed the matter with respondent and respondent disagreed with her and insisted on placing cases on the No Progress Docket before the requisite 91 days had elapsed. (Tr VIII, 1277-1278). Ms. Taylor had a second meeting with respondent during which she explained to her that the 91 day requirement did not start on the date the case was filed, but began from the last intervening activity. (Tr VIII, 1286-1287). Respondent refused to respond and thereafter continued to place cases on the No Progress Docket in violation of court rule. (Tr VIII, 1287). For purposes of this proceeding, Ms. Taylor found four cases that were improperly put on the No Progress Docket. (Tr VIII, 1289, Exhibits 40, 41, 42, 43).

Attorney Mark Meadows testified that his case, *In the Matter of Michael J. Friedman, M.D.*, Case No. 04-001295 CZ was actually an administrative case, but was filed in circuit court in order to obtain subpoenas for the matter. (Tr IX, 1389). Therefore, he was surprised when he received a notice that the case had been listed on the No Progress Docket. At the no progress hearing, Mr. Meadows explained the purpose of filing the matter in circuit court. Respondent agreed not to dismiss the case. However,

the next week, respondent changed her decision and signed the order dismissing the case even though Mr. Meadows still needed subpoenas. (Tr IX, 1388-1394; Exhibit 37).

The Master finds that respondent improperly instructed her clerk to list cases on the No Progress Docket even after repeated conversations with her court clerk and her court clerk's supervisor in which they informed her of the requirements of MCR2.502. Respondent's assertion that this issue is without merit because of the "infinitesimally small" number of cases introduced by examiner to support its argument is wholly unpersuasive (Respondent's Written Closing Argument, 29). First, there is no indication that the list of cases introduced by examiner was an exhaustive list of the cases improperly listed on the No Progress Docket, and second, even if it were, a judge is not permitted to patently ignore court rules even an "infinitesimally small" number of times.

Based upon these factual findings, the Master concludes that respondent is responsible for the following as a matter of law:

Misconduct in office as defined by the Michigan Constitution of 1963, as amended, Article VI, §30 and MCR 9.205;

Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article VI, §30 and MCR 9.205;

Failure to establish, maintain, enforce and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to the Michigan Code of Judicial Conduct (MCJC), Canon 1;

Failure to bear in mind that the judicial system is for the benefit of the litigant and the public, not the judiciary, contrary to MCJC, Canon 1;

Conduct involving impropriety and the appearance of impropriety, which erodes public confidence in the judiciary, in violation of MCJC, Canon 2A;

Failure to respect and observe the law and so conduct herself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary contrary to MCJC, Canon 2B;

Failure to be faithful to the law and to maintain professional competence in it, contrary to MCJC, Canon A(1);

Lack of personal responsibility for respondent's own behavior and for the proper conduct and administration of the court in which respondent presides, contrary to MCR 9.205(A);

Conduct prejudicial to the proper administration of justice, in violation of MCR 9.104(A)(1);

Conduct that exposes the legal profession or courts to obloquy, contempt, censure or reproach, contrary to MCR 9.104(A)(2);

Conduct contrary to justice, ethics, honesty or good morals, in violation of MCR 9.104(A)(3);

Conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(A)(4).

Count IV: Excessive absences, belated commencement of proceedings, untimely adjournments and improper docket management.

The Master finds by a preponderance of the evidence that respondent did engage in excessive absences, belated commencement of proceedings, untimely adjournments and improper docket management based upon the following:

The people who worked most closely with respondent all testified that her attendance was a problem. Her former judicial assistant, court clerk, and law clerk all testified that respondent usually only came to work on Wednesdays or scheduled trial days. (Tr V, 670, 766; Tr XI, 1961-1962). This contention was further supported by respondents 2005 Date Book (Exhibit 112); wherein there are 25 weeks when respondent was not on vacation where the only activity scheduled for the week is on Wednesdays. Additionally, David Easterday, the 30th circuit court administrator testified that he kept a spreadsheet tallying respondent's acknowledged vacation days. (Exhibit 58). This spreadsheet indicates that during a nine month period in 2005 respondent took 31 vacation days. Court rule provides that Michigan judges are only entitled to 30 days off per year. MCR 8.110(D)(3).

Judge Collette testified that he had heard complaints from other judges and attorneys about respondent's hours. (Tr XVII, 2867-2868). Judge Collette felt the problem was severe enough that he sent respondent a memo "intended to be a wake-up call" about her work schedule. (Exhibit I; Tr XVII, 2868-2869). Respondent did not change her behavior as a result of this memo. (Tr XVII, 2868-1869).

Examiner has proven the following specific examples of respondent's problems with attendance and punctuality:

Ms. Hamlin testified that in December 2005, respondent was scheduled to sign subpoenas on a Friday. Two detectives came to court seeking subpoenas, but respondent was not there. When respondent's staff contacted her, she told them that she would be in shortly and she instructed her staff not to obtain the subpoenas from the other judges. She did not come to work until 4:30 p.m. The detectives never got their subpoenas that day because by the time respondent signed them, the detectives' shifts had ended and they were no longer available to pick them up. (Tr V, 760-761).

Ms. Hamlin also testified that on November 18, 2005 respondent was conducting a bench trial. Respondent adjourned the trial for a one-hour lunch break; however, respondent actually went to Brighton, Michigan to pick up a family member and was caught in heavy traffic. Respondent did not contact her staff to cancel the remainder of the day until 3:00 p.m. leaving attorneys and litigants awaiting her return for hours. (Tr V, 758-759).

Both Ms. Hamlin and Ms. Kirkpatrick testified that they were present in the courtroom one day in early 2005 while respondent was hearing motions. In front of a full courtroom, respondent stood up and announced that she was leaving to go let a repairman into her house. She did not return for two hours. (Tr V, 738-740; Tr VII, 1178-1180).

Assistant Prosecutor Nick Bostic testified that on January 30, 2006 he appeared in respondent's courtroom ready for trial. Respondent's staff told Mr. Bostic that all matters scheduled that day and the next were canceled because respondent's sister in Detroit was ill. (Tr XV, 2625-2635; Exhibit 42).

Assistant Prosecutor John Dewane testified to several occasions where respondent was late taking the bench in the morning. On September 18, 2006 respondent was 45 minutes late to hear a motion. On November 1, 2006 respondent did not take the bench until 9:45 a.m. On November 8, 2006 respondent did not appear to sentence 18 criminal defendants and all of the sentencings had to be rescheduled. On December 18, 2006 jurors were ready and waiting at 8:30 a.m., but respondent did not take the bench until 10 a.m. On March 19, 2007 respondent did not arrive for a trial until 10:30 a.m. and appeared very disoriented. On April 30, 2007 there were five criminal cases scheduled for 8:30 a.m. and respondent did not arrive until 10:45 a.m. (Tr XV, 2534-2549).

The Master finds that respondent was not merely occasionally absent or tardy, but that the evidence supports a finding that she engaged in an unacceptable pattern of tardiness and absenteeism. While the individual occurrences viewed in isolation may not seem particularly egregious, it is the volume of incidents and the testimony from so many different attorneys and coworkers that the Master finds particularly telling. Respondent's lax work schedule inconvenienced parties, attorneys, court staff and other judges.

Based upon these factual findings, the Master concludes that respondent is responsible for the following as a matter of law:

Misconduct in office as defined by the Michigan Constitution of 1963, as amended, Article VI, §30 and MCR 9.205;

Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article VI, §30 and MCR 9.205;

Failure to establish, maintain, enforce and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to the Michigan Code of Judicial Conduct (MCJC), Canon 1;

Failure to bear in mind that the judicial system is for the benefit of the litigant and the public, not the judiciary, contrary to MCJC, Canon 1;

Conduct involving impropriety and the appearance of impropriety, which erodes public confidence in the judiciary, in violation of MCJC, Canon 2A;

Allowing family, social or other relationships to influence judicial conduct or judgment, in violation of MCJC, Canon 2C;

Lack of personal responsibility for respondent's own behavior and for the proper conduct and administration of the court in which respondent presides contrary to MCR 9.205(A);

Conduct prejudicial to the proper administration of justice, in violation of MCR 9.104(A)(1);

Conduct that exposes the legal profession or courts to obloquy, contempt, censure or reproach, contrary to MCR 9.104(A)(2);

Conduct contrary to justice, ethics, honesty or good morals, in violation of MCR 9.104(A)(3);

Conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(A)(4).

Count V: Improper *ex parte* communications

The Master finds that petitioner has failed to establish by a preponderance of the evidence that respondent engaged in improper *ex parte* communications. The testimony on this matter indicates that there were occasions where respondent called attorneys in the community. However, these conversations concerned non-substantive matters that were not relevant to the merits of the cases before her; thus, these conversations did not rise to the level of improper *ex parte* communications.

Count VI: Allowing social or other relationships to influence release of a criminal defendant from probation

The Master finds by a preponderance of the evidence that respondent did allow a social relationship to influence the release of a criminal defendant from probation based upon the following:

Gwen Dupard was a supervisor in the clerk's office in the 30th Circuit Court (Tr XII, 2071). Respondent worked in the same building with Ms. Dupard, but Ms. Dupard's job did not require that she be in respondent's courtroom or chambers on a regular basis. (Tr XXIII, 3921). Although respondent contends that she did not have a social relationship with Ms. Dupard, the following telephone message left by respondent for Ms. Dupard on February 17, 2004 leads the Master to conclude that the two were in fact friends:

> Hi Gwen this is Bev. Um it's 6:30 so I'm thinking you're probably—you should be gone by now. Um we're going to be here until 7:00 to see if we can get a verdict from the jury. If not um as you know it's motion day let's just try to get together for sure. My afternoon is real light but um by

my morning is semi regular. So hopefully we can touch bases. Ok. Bye bye. (Tr XIII, 2366-2367).

DeShawn Anderson was a criminal defendant who had been convicted of felon in possession of a firearm and possession of cocaine. (*People v DeShawn Anderson*, Case No. 01-77466-FH; Exhibit 9). His probation was assigned to respondent. Mr. Anderson and Ms. Dupard were romantically involved and began living together in late 2003 or early 2004. (Exhibit 14A; Tr XXI, 3564-3565).

Jason Gordon was Mr. Anderson's probation agent. He testified that he prepared a petition for Show Cause on September 24, 2003 because Mr. Anderson tested positive for marijuana six times and failed to take urine screens. (Tr II, 231-232). On October 2, 2003, respondent's assistant, Ms. Morgan, sent an email on behalf of respondent to the probation department indicating that respondent wanted to terminate Mr. Anderson from probation early. (Tr II, 232-234; Exhibit 9b). However, Mr. Anderson was already scheduled for a show cause hearing and respondent did not pursue the early discharge at that time. (Tr XI, 1753).

Mr. Gordon testified that on October 15, 2003 Mr. Anderson appeared before respondent for a violation of probation hearing. At that hearing, Ms. Dupard was in the courtroom sitting "where court officials were sitting". (Tr II, 241). Shortly after this hearing, Ms. Morgan contacted Gordon and told him to amend the order to remove the drug treatment requirement because Anderson couldn't afford to pay for drug treatment, and to require that Anderson "drop less." (Tr II, 246).

In the months following this hearing, Mr. Anderson continued to test positive for illegal drugs, had not completed a required program, and had not paid court oversight fees. (Tr II, 253-254). In January 2004, several of respondent's staff noticed that

respondent and Ms. Dupard held several closed door meetings in respondent's chambers. (Tr V, 680-681; Tr XI, 1774-1777; Tr XXIIII, 4062).

In January 2004, respondent faxed Mr. Gordon and indicated, "Defendant to discharge ASAP; Judge Beverly Nettles-Nickerson, 1/29/04." (Exhibit 9d; Tr II, 247). Mr. Gordon called Ms. Morgan to see if respondent really wanted Mr. Anderson discharged from probation early. Mr. Gordon voiced his concerns to Ms. Morgan and told her "I was about to violate the guy." (Tr II, 248). Respondent's office sent another fax, with a note "Go ahead and prepare discharge." (Exhibit 9e; Tr II, 249). Finally, Mr. Gordon received a third fax which was identical to the first two, but handwritten at the bottom was the following notation by respondent; "Gwen, prepare discharge. We should have contacted Probation first. We may terminate early. Defendant to relocate to Detroit with a job." It was signed by Judge Nettles-Nickerson. (Tr II, 250-251; Exhibit 9f). It is this note to "Gwen" signed by respondent that the Master finds most compelling. First, there is no reason for Ms. Dupard to have been involved in the preparation of this document. Second, it illustrates that respondent and Ms. Dupard were on a first name basis. Third, the information about Anderson's job in Detroit did not come from the probation department, and must have come from Ms. Dupard herself.

Nearly every judge who testified at these proceedings indicated that it was highly unusual for a judge to independently initiate the termination of a probationer, as did employees from the probation department. In fact, none of the judges who testified had ever done such a thing, and none of the probation department employees had ever seen a judge do such a thing before respondent.

Mr. Gordon prepared an order discharging Mr. Anderson from probation and included the language "per the judge's request" which is not a typical way to word a discharge. (Tr II, 253). Respondent never contacted Mr. Gordon or anyone else in the probation department to inquire as to whether Mr. Anderson had satisfied his probation obligations. (Tr XVII, 2848-2851). On February 13, 2004 respondent signed the order discharging Mr. Anderson from probation (Exhibit 9g). Following an investigation into this matter, Ms. Dupard was fired from her job at the 30th Circuit Court. (Tr XVII, 2862-2863).

The Master finds that respondent improperly allowed her friend Ms. Dupard to influence her decision to release Mr. Anderson from probation early. Respondent took it upon herself to effectuate a probationer's discharge by her own initiative. This is a highly unusual course of action. However, it would not necessarily constitute misconduct absent the convincing evidence of respondent's personal relationship with Ms. Dupard, and respondent's lack of diligence in investigating Mr. Anderson's progress as a probationer. It was this combination of unusual, unethical, and grossly negligent behaviors that led the Master to his conclusion that respondent initiated the release of Mr. Anderson as a personal favor to Ms. Dupard.

In addition, however, the Master also finds that the probation department acted improperly in its handling of this incident. The probation department failed to inform respondent about Mr. Anderson's multiple additional probation violations that had not been addressed at the time of his discharge, or that Mr. Anderson was living with Ms. Dupard in violation of his probation, or that Mr. Anderson had not completed a class required by his probation, or that Mr. Anderson still owed the court a fee (Tr II, 266, 267-

270). It is the job of the probation department to keep a judge abreast of a probationer's progress. Here, they failed to do so and it contributed to the early discharge of Mr. Anderson.

Based upon these factual findings, the Master concludes that respondent is responsible for the following as a matter of law:

Misconduct in office as defined by the Michigan Constitution of 1963, as amended, Article VI, §30 and MCR 9.205;

Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article VI, §30 and MCR 9.205;

Allowing family, social, or other relationships to influence judicial conduct or judgment, in violation of MCJC, Canon 2C;

Conduct prejudicial to the proper administration of justice, in violation of MCR 9.104(A)(1);

Conduct that exposes the legal profession or courts to obloquy, contempt, censure or reproach, contrary to MCR 9.104(A)(2);

Conduct contrary to justice, ethics, honesty or good morals, in violation of MCR 9.104(A)(3);

Conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(A)(4).

Count VII: Attempted retaliation against the probation department and certain employees as a result of the Deshawn Anderson incident

The Master finds that examiner has failed to establish by a preponderance of the evidence that respondent attempted to retaliate against the probation department and certain employees as a result of the Deshawn Anderson incident.

The testimony established that respondent was upset that the probation department deliberately kept relevant information from her. (Tr XXIII, 3928). Probation employees testified that they knew Mr. Anderson and Ms. Dupard were living together and that Mr. Anderson had violated probation by failing drug tests before respondent signed the order discharging him from probation. (Tr II, 262, 269). Yet, the probation department specifically withheld that information from respondent.

Whatever potential improprieties surrounded this matter, respondent was the judge in the case and there was an order of probation requiring that all probation violations be reported to the judge (Exhibit 9). Respondent's dissatisfaction with how the probation department handled this matter is understandable. Her subsequent conversations with supervisors in the probation department appear to the Master to have been a means of ensuring that this type of incident did not happen again rather than an attempt at retaliation against certain employees.

Count VIII: Improper termination of judicial assistant Angela Morgan and cover-up of reasons for dismissal

The Master finds that examiner has failed to establish by a preponderance of the evidence that respondent improperly terminated her judicial assistant Angela Morgan.

Judicial Assistants are at-will employees. The Master finds that respondent terminated Ms. Morgan because she discovered that Ms. Morgan was seeking new employment. (Tr XI, 1797). Because Ms. Morgan was an at-will employee, respondent was well within her rights to terminate her for whatever reason she saw fit, so long as it did not violate the law. Here, the Master has not seen any evidence that would convince him that respondent's motives in terminating Ms. Morgan were unlawful.

Count IX: Incident at service station

The Master finds that respondent did engage in judicial misconduct during the course of an incident at a service station based upon the following evidence:

On January 16, 2006 respondent was involved in an incident at a service station owned by Richard Keusch and located in Portland, Michigan. (Tr XIII, 2295). At around three or four o'clock that afternoon, respondent paid at the pump for $51.65 worth of gasoline. Mr. Keusch testified that respondent then came in to the station, and demanded reimbursement and told Mr. Keusch, "your pumps are off, you're cheating the public, you're a corrupt businessman." (Tr XIII, 2296-2299).

Respondent made these accusations in a raised voice in front of other customers. Mr. Keusch tried to explain that there might be a problem with her vehicle or his pumps.

Then he asked her to pull up to a different pump where he was able to pump an additional $3.00 worth of gas into her vehicle. At that point Mr. Keusch believed that respondent's tank was full and that she had received the $51.65 previously pumped into the vehicle and the problem was with respondent's gas gauge. (Tr XIII, 2296-2299). He requested that respondent pay for the additional three dollars worth of gasoline that he had just pumped into her vehicle. Respondent said, "I'm not paying for it" and continued to make accusations that Mr. Keusch was "cheating the public" in front of other customers. (Tr XIII, 2300).

Respondent gave Mr. Keusch her business card identifying her as a judge and told him she would get to the end of this matter, then drove off without paying for the additional $3.00 worth of gasoline. (Tr XIII, 2301, Exhibit 65). Mr. Keusch called the police because he perceived respondent's actions as a threat. (Tr XIII, 2302). Shortly thereafter, an article appeared in the local newspaper detailing the incident. The day after the article appeared, respondent called the service station and authorized payment of $3.00 to the store on her credit card. (Tr XIII, 2303-2304, Exhibit 136).

The Master finds that respondent recklessly flaunted her judicial office. Her actions humiliated Mr. Keusch and tarnished his reputation in his community. Furthermore, respondent's use of her judicial office to threaten Mr. Keusch was a gross abuse of her position and an embarrassment to herself and her colleagues. Respondent's flagrant attempt to exploit her elected position eroded the public's trust in Michigan's judicial system.

Based upon these factual findings, the Master concludes that respondent is responsible for the following as a matter of law:

Misconduct in office as defined by the Michigan Constitution of 1963, as amended, Article VI, §30 and MCR 9.205;

Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article VI, §30 and MCR 9.205;

Conduct involving impropriety and the appearance of impropriety, which erodes public confidence in the judiciary, in violation of MCJC, Canon 2A;

Using the prestige of office to advance personal business interests contrary to MCJC Canon 2C;

Conduct prejudicial to the proper administration of justice, in violation of MCR 9.104(A)(1);

Conduct that exposes the legal profession or courts to obloquy, contempt, censure or reproach, contrary to MCR 9.104(A)(2);

Conduct contrary to justice, ethics, honesty or good morals, in violation of MCR 9.104(A)(3);

Conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(A)(4).

Count X: Race and racism

The Master finds that examiner has established by preponderance of the evidence that respondent used race and allegations of racism inappropriately based on the following:

A. The race card

Respondent's law clerk Ann Marie Ward-Fuchs testified that in fall of 2003 respondent confronted her about being the source of rumors in the courthouse that respondent was a "part time judge." Respondent called Ms. Ward-Fuchs into her office and pointed to a picture on the wall of an African American girl holding some books, walking to school with two policemen and said, "you see that girl in the picture, I feel like that little girl. I will not hesitate to play the race card." (Tr V, 673-674).

B. The memo from the Chief Judge

In March, 2004 Chief Judge William Collette sent respondent a confidential memo about her attendance and settlement practices. (Exhibit 1, Tr XVII, 2867). On March 15, 2004 Judge Collette met with respondent and with Mr. Hughes to talk about the content of the memo. Both Judge Collette and Mr. Hughes testified that during this meeting respondent called them "racist." (Tr XVII, 2876). Respondent also said that Judge Collette and Mr. Hughes were "two white boys" ganging up on a black judge. (Tr XVII, 2876; Tr I, 82). She also repeatedly called Judge Collette a liar during this meeting. (Tr XVII, 2876).

On January 31, 2005 respondent had a meeting with Mr. Hughes, Carl Gromek, Mr. Easterday and Judge Lawless. The purpose of the meeting was to address respondent's tardiness, absences, settlement practices and the dismissal of Gwen Dupard. Respondent refused to acknowledge that there was a problem and again accused Judge Collette of disparate treatment. (Tr I, 90-93).

C. Spurious complaint with the Michigan Civil Rights Commission

The Master finds that examiner has failed to establish by a preponderance of the evidence that respondent filed a spurious complaint with the Michigan Civil Rights Commission.

On January 18, 2006 respondent filed a complaint with the Michigan Civil Rights Commission alleging that Judge Collette was engaging in race-based discriminatory interference with respondent's ability to operate her courtroom, supervise court staff and properly conduct proceedings. (Exhibit 54). The Master finds that it is respondent's right to file such a claim. Respondent should not be penalized for exercising her right as a citizen.

D. Further unsubstantiated allegations of racial discrimination

Rhonda Swayze testified that she sent out an email to all judges reminding them of the proper procedure for jury recycling. Respondent requested a meeting about this matter. At the meeting, respondent questioned Ms. Swayze's motive for sending out the email, specifically asking if it was because she (respondent) was a black female. (Tr VII, 1080).

In addition, on January 26, 2007 respondent held a press conference in her courtroom. During this press conference respondent made statements alluding to her contention that Judge Collette was treating her differently because of her race. (Exhibit 5-A and 5-B).

In addition, respondent made statements to a journalist from The City Pulse that appeared in that publication that Judge Collette had denied her the ability to operate her

courtroom, supervise her staff and conduct her proceedings because of her race. (Exhibit 84).

Judge Draganchuk testified that before she was a judge she was a prosecutor. On one occasion she tried a case before respondent. A fingerprint expert from the Michigan State Police was testifying about how he performed his computer search and respondent became upset and said, "and did you put in black people only?" Judge Draganchuck said that the expert appeared to be taken aback and said, "No." When Judge Draganchuk moved to bind the case over, respondent denied the motion and dismissed the case. (Tr VII, 1005).

The Master finds that respondent used allegations of racism inappropriately. On multiple occasions, when her personal work ethic was called in to question, she cried racism. She also used allegations of racism to manipulate and intimidate the people with whom she worked. A charge of racism is a bell that cannot be unrung. Respondent's wonton use of the word has damaged individuals and the judiciary as a whole.

Based upon these factual findings, the Master concludes that respondent is responsible for the following as a matter of law:

Misconduct in office as defined by the Michigan Constitution of 1963, as amended, Article VI, §30 and MCR 9.205;

Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article VI, §30 and MCR 9.205;

Failure to establish, maintain, enforce and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to the Michigan Code of Judicial Conduct (MCJC), Canon 1;

Conduct involving impropriety and the appearance of impropriety, which erodes public confidence in the judiciary, in violation of MCJC, Canon 2A;

Failure to be patient dignified and courteous to those with whom respondent deals in an official capacity, contrary to MCJC, Canon 3A(3);

Lack of personal responsibility for respondent's own behavior and for the proper conduct and administration of the court in which respondent presides contrary to MCR 9.205(A);

Persistent failure to treat persons fairly and courteously, contrary to MCR 9.205(B)(1)(c);

Treating persons unfairly or discourteously because of the person's race, gender, or other protected personal characteristic, contrary to MCR 9.205(B)(1)(d);

Conduct prejudicial to the proper administration of justice, in violation of MCR 9.104(A)(1);

Conduct that exposes the legal profession or courts to obloquy, contempt, censure or reproach, contrary to MCR 9.104(A)(2);

Conduct contrary to justice, ethics, honesty or good morals, in violation of MCR 9.104(A)(3);

Conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(A)(4).

Conclusion

The Master concludes that examiner has proven by a preponderance of the evidence Counts I; II(A),(B),(C),(D) and (E); III; IV; VI; IX; and X (A),(B) and (D). Respondent demonstrates a lack of respect for these proceeding, for her elected position, and for the judiciary as a whole. Respondent follows her own dictates without regard for what is right and continually hides behind charges of racism and sexism when confronted about her improprieties.

_____ _____

Hon. Leopold. P. Borrello, P11023 Date
Special Master